Office - Supreme Court, U. S.
FILED
MAR 19 1945
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1053

OKEECHOBEE COUNTY, FLORIDA,
Petitioner,

vs.

JOHN NUVEEN AND JOHN NUVEEN, JR., AS CO-PARTNERS, DOING BUSINESS UNDER THE NAME OF JOHN NUVEEN & COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

MANLEY P. CALDWELL,
Counsel for Petitioner.

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Summary statement of matters involved	1
Basis of the jurisdiction of the Superme Court	7
Reasons relied upon for granting the writ	7
Prayer for writ	8
Brief in support of petition	10
Opinions below	10
Statement of the grounds on which jurisdiction is invoked	10
Statement of the case	10
Questions involved	10
Argument	12
A. The decision of the District Court is in conflict with decisions of this court	12
B. The decision of the District Court is in conflict with the common law rule (the common law rule being in force in Florida)	13
C. The decision of the District Court is contrary to the decisions of other Circuit Courts of Appeals	14
D. The District Court, in determining as a matter of Florida Law that the new issue of bonds could not be sold and delivered between June, 1942 and August, 1942, because the callable bonds which they were to replace could not be called and redeemed at the time of such sale, failed to follow the decisions of Florida on the point	15
Conclusion	17

Table of Cases Cited

Alfred I. duPont Testamentary Trust v. *Okeechobee County*, 128 F. 2d 451	3,5
Chicago, Milwaukee & St. Paul Ry. Co. v. *Hoyt*, 149 U. S. 1, 37 L. Ed. 625	7,12

Page

City of Miami v. *State*, 139 Fla. 598, 190 So. 774..... 8
English v. *Hetherington & Berner, Inc.*, 71 F. 2d 613... 8
Fleeman v. *City of Jacksonville*, 140 Fla. 478, 191 So. 840. 8
Jacksonville Mayport, etc. R. R. v. *Hooper*, 160 U. S. 514, 40 L. Ed. 515..... 7,12
Jones v. *United States*, 96 U. S. 24, 24 L. Ed. 644..... 7,12
Harriman, The, 9 Wall. 161, 19 L. Ed. 629..... 7,12
Kansas Union Life Insurance Co. v. *Burman*, 141 Fed. 848..... 15
Klauber v. *Car Company*, 95 Cal. 353, 30 Pac. 555.... 15
Moller v. *Herring*, 255 Fed. 670..... 14
Moon v. *Wilson*, 100 Fla. 791, 130 So. 25..... 13
Northern Pacific Ry. Co. v. *American Trading Co.*, 195 U. S. 439, 49 L. Ed. 269..... 7,12
Parradine v. *Jane*, Allyn 26..... 8,13
South Memphis Land Co. v. *McLean Hardware Co.*, 179 Fed. 417..... 8,15
State v. *City of Miami*, 142 Fla. 284, 194 So. 792..... 8
State v. *City of Miami*, — Fla. —, 19 So. 2d 410..... 16

STATUTES CITED

Judicial Code, sec. 240(a) as amended, 28 U. S. S. C. 347 (a)..... 10
Florida Statutes, 1941, Chapter 2.01..... 13
Municipal Composition Act 11 U. S. C. 401–403..... 3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1053

OKEECHOBEE COUNTY, FLORIDA,
Petitioner,

vs.

JOHN NUVEEN AND JOHN NUVEEN, JR., AS CO-PARTNERS, DOING BUSINESS UNDER THE NAME OF JOHN NUVEEN & COMPANY

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice, and Associate Justices of the Supreme Court of the United States:

The petitioner above named respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered November 18, 1944, 145 F. (2) 684, (R. 136), petition for rehearing denied December 19, 1944 (R. 144).

(A) Summary Statement of Matters Involved

On August 8, 1941, John Nuveen and John Nuveen, Jr., (hereinafter referred to as Nuveens), entered into a contract with Okeechobee County, Florida (hereinafter re-

ferred to as County), to refund an issue of callable Road and Bridge Refunding Bonds, dated June 1, 1940, due June 1, 1970 (R. 8-15). The contract provided that the issue of Refunding Bonds would be transmuted into a new issue of non-callable bonds bearing lower rates of interest. Nuveens were to have the exclusive right to exchange the Road and Bridge Refunding Bonds dated June 1, 1940 for the new Refunding Bonds during the life of the contract. The County agreed to hold a public sale for the new Refunding Bonds which had not been exchanged, at which sale bidders would be required to bid for all or none of the bonds then ready for sale. Nuveens guaranteed to bid, at the time of the sale, a price of 103 and accrued interest for all of the bonds to be sold (R. 10). The contract provided (R. 11):

> "In the event that the successful bidder at said sale shall request the Board to accelerate delivery of the new Refunding Bonds to a date prior to the date of call, the Board will make delivery as requested, provided, however, that the successful bidder shall reimburse your Board for any interest to be paid on presently outstanding bonds between the date of delivery of the new Refunding Bonds and the date of call."

The 1940 Refunding Bonds were callable on any interest payment date on thirty days notice, at par, plus accrued interest. The interest was payable each June and December, therefore the call had to be made prior to November or May in each year.

The County agreed that it would not consider any bid of less than 103 (R. 11), and Nuveens were to receive a fee of three percent on the par value of the bonds sold.

The agreement was to continue in full force and effect from one year after its execution (one year from August 8, 1941), or until such later date as might be mutually satisfactory (R. 12).

The Nuveens put up a certified check for $10,000 to be forfeited as full and complete liquidated damages if they failed to fulfill the terms of the contract (R. 12). There were only two exceptions to this good faith guarantee deposit. One was that the Nuveens would be relieved of bidding on the bonds offered for sale if the United States was, at the time of the sale, involved, in war, and second, if the nationally recognized counsel (employed by Nuveens) failed to approve the new bonds.

Simultaneously with the execution of that agreement another agreement was entered into between the parties (R. 15-16), by which Nuveens agreed to indemnify the County against any litigation that might follow as a result of the execution of the first contract, and would defend all such suits without charge to the County. A $1,000.00 good faith check was likewise tendered in support of this agreement to be returned at the end of a year unless Nuveens should default in their undertaking, then in that event the check was to be cashed and the amount was to be accepted by the County as full liquidated damages for Nuveens failure to perform the obligations thereunder.

At the time of the execution of the contract, the County was then proceeding under the provisions of the Municipal Composition Act (11 U. S. C. 401-403) to compose its bonded indebtedness and force original issues of bonds (dated prior to June 1, 1940) into the very issue of Road and Bridge Refunding Bonds, dated June 1, 1940, which were the subject of the contract.

The Interlocutory Decree had been entered in March, 1941 confirming the composition proceedings, but was at the time of the execution of the contract on appeal, without supersedeas, to the United States Circuit Court of Appeals by certain objecting creditors. *Alfred I. duPont Testamentary Trust* v. *Okeechobee County*, 128 F. (2) 451. Both

parties knew of this fact; likewise, prior to the execution of the contract, the County had questioned Nuveens as to whether or not it should enter into the contract because of the bankruptcy proceedings (R. 91-93). Nuveens advised that the bankruptcy proceedings would hardly make the contract improper (R. 94).

The 1940 Road and Bridge Refunding Bonds, which were the subject of the contract, provided (R. 80) that if any of them were called prior to maturity they should be called by lot. There was a total of $1,125,542.54 of Road and Bridge Refunding Bonds authorized to replace a like amount of original indebtedness (dated prior to June 1, 1940), but there had been manually exchanged under the terms of the composition proceedings at the time of the contract only $824,720.47 of this total issue (about 75 percent). The remaining 25 percent of unexchanged original securities consisted in the most part of original bonds, dated prior to June 1, 1940, and which were being forced to take the 1940 Refunding Bonds by the composition proceedings.

After the execution of the contract, and in accordance with its terms, Nuveens caused a resolution to be prepared authorizing the issuance of the new Refunding Bonds (R. 59-71), which were to replace the 1940 callable bonds. This resolution did not provide bonds to replace the total of $1,125,542.54 of 1940 bonds outstanding, but only provided enough bonds to replace those that had been manually exchanged at that time. Thereafter, Nuveens prepared a proposed resolution to be adopted by the County calling the 1940 bonds for redemption on December 1, 1941 (R. 16). This call for redemption did not call the 1940 Refunding Bonds by lot, as required by the composition proceedings under the terms of the composition proceedings at the time of the contract, but was a blanket call for all bonds that had been manually exchanged, leaving all those that had

been authorized, but not manually exchanged, outstanding. The County adopted the resolution and gave notice of call (R. 16).

On November 22, 1941, the Fiscal Agent, under the composition proceedings, filed a petition in the bankruptcy court (R. 72-77) reciting to the Court that the composition had not been completed, was then on appeal, that the County had entered into a contract with Nuveens under which the call was not made by lot, and asked the Court to stay the proceedings or enter such other orders as might be appropriate. The attorney for Nuveens assisted the County in appearing in opposition to the order; however, the Court entered an order (R. 17) requiring the County to remain in status quo until the appeal was determined. Thereafter, in accordance with the order, the County revoked the call for redemption for December 1, 1941.

In February, 1942, after the entry of the order by the Court in the composition proceedings, the County attempted to cancel Nuveens' contract. Nuveens' representative appeared before the County (R. 88), and stated to the Board that Nuveens had an enforceable contract that the County could not legally rescind; that the contract had been developed to its present point at a great outlay of time and money, and was one which they (Nuveens) expected to enforce by every legal means at their command, and that the logical procedure was for the County to do exactly as the Judge had ordered and take no action of any kind until all litigation had been disposed of.

The appeal in the composition proceedings was dismissed in the early part of June, 1942 (*Alfred I. duPont Testamentary Trust, et al.* v. *Okeechobee County*, 128 F. (2) 451).

Immediately thereafter, the County applied to the United States District Court in the composition proceedings and asked the Court for an order allowing it to proceed with

the contract. Nuveens were notified by letter to this effect on June 15, 1942, and likewise notified that the validation of the new bonds would be concluded at an early date (R. 23). On June 30, 1942, Nuveens talked to the County Attorney (R. 96-97), suggesting that the best thing for them to do (the Nuveens) was to come down and "reshuffle the cards." Nuveens were informed that the validation would be completed on July 7, 1942, to which they replied that the matter should rest until they were heard from. Thereafter, on July 23, 1942, the County advised Nuveens that the decree validating the Refunding Bonds had been entered, and requested the bonds be prepared and printed, and forwarded to Okeechobee County for signature so they could be offered for sale. Nuveens requested a certified transcript of the validation proceedings (R. 25). To this request, the County replied that the complete transcript, with the exception of the final decree, had been mailed to Nuveens on November 7, 1941, but a new transcript would be forwarded to them, however there was no reason for delay because Chapman & Cutler, Nuveens' attorneys, had prepared the same.

On August 6, 1942, for the first time during the whole contract (R. 27), Nuveens advised the County that they had given careful consideration to the contract and that the contract had become impossible of performance before August 8, 1942, and requested the return of their check. The County declared a forfeiture of the money for failure of Nuveens to perform their contract.

Nuveens sued the County for the return of their money. The case was tried before the Judge and no testimony was offered by Nuveens, and very little by the County. Both sides requested and received admissions of fact. The District Court (R. 113-120) determined, as a matter of law, that the injunctive order relieved Nuveens from the payment of $10,000 as liquidated damages because the contract,

which the $10,000 guaranteed, had been enjoined. The Court further determined that after the injunction was lifted in June, 1942, there was not sufficient time between that date and August 8, 1942, the time of the expiration of the contract, within which the Nuveens could have performed because the callable bonds could not have been called for redemption in the interim between the time the injunctive order was lifted and the expiration of the contract.

The Circuit Court of Appeals affirmed, with one Judge (Judge Holmes) dissenting.

(B) Basis of the Jurisdiction of the Supreme Court

The Supreme Court of the United States has jurisdiction under Section 240 (a) of the Judicial Code, as amended. Title 28 U. S. C. A. 347 (a) to review the judgment.

(C) Reasons Relied Upon for Allowing the Certiorari

1. The District Court and the Circuit Court of Appeals, in applying the law of Florida as to impossibility of performance arising subsequent to the execution of the contract, there being no decisions in Florida precisely on point, should have followed the decisions of the Supreme Court of the United States, and in particular one coming up in Florida, that impossibility of performance of a contract arising subsequent to its execution did not relieve the Nuveens from a forfeiture of their good faith deposit. *Jacksonville Mayport, etc. R. R.* v. *Hooper*, 160 U. S. 514, 40 L. Ed. 515, 524 (Florida case); *Chicago, Milwaukee & St. Paul Railway Co.* v. *Hoyt, et al.*, 149 U. S. 1, 37 L. Ed. 625; *The Harriman*, 9 Wall. 161, 172, 173, 19 L. Ed. 629; *Jones* v. *United States*, 96 U. S. 24, 29, 24 L. Ed. 644; *Northern Pacific Railway Co.* v. *American Trading Co.*, 195 U. S. 439, 466, 467, 49 L. Ed. 269.

2. There being no Florida case on point, the District Court should have followed the common law rule which is in force and effect in Florida that impossibility of performance arising subsequent to the execution of a contract will not excuse one of the contractors from damages for failure to perform. *Parradine* v. *Jane*, Allyn 26.

3. The decision of the Circuit Court of Appeals that impossibility of performance arising subsequent to the execution of a contract would release one of the parties from paying contracted liquidated damages for failure to perform is in conflict with and contrary to decisions of other Circuit Courts of Appeal. *South Memphis Land Co.* v. *McLean Hardware Co.*, 179 Fed. 417 (C. C. A. 6) (1910); *English* v. *Hetherington & Berner, Inc.* (C. C. A. 7) (1934) 71 F. (2) 613, 616.

4. The District Court, in determining as a matter of law that the callable issue of bonds (dated June 1, 1940), had to be called simultaneously with the sale and delivery of the new Refunding Bonds is contrary to many Florida decisions precisely on point. (In addition it is contrary to the plain terms of the contract (R. 11)). *State* v. *City of Miami*, — Fla. —, 19 So. (2) 410; *City of Miami* v. *State*, 139 Fla. 598, 190 So. 774; *Fleeman* v. *City of Jacksonville*, 140 Fla. 478, 191 So. 840; *State* v. *City of Miami*, 142 Fla. 284, 194 So. 792.

Prayer for Writ of Certiorari

WHEREFORE, your Petitioner prays that a writ of certiorari be issued under the seal of this Court directed to the United States Circuit Court of Appeals commanding said Circuit Court of Appeals to send to this Court in due course all matters essential to the consideration of the questions presented by this petition, had in the case entitled on its docket "Okeechobee County v. John Nuveen, etc. et al.,

No. 11901," to the end that said cause may be reviewed and determined by this Court, as provided by the Statutes of the United States, and the judgment of the said Circuit Court of Appeals in said cause be reversed, and for such further relief as to this Court may seem proper.

Respectfully submitted,

MANLEY P. CALDWELL,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I. Opinions Below

The opinion of the District Court appears on pages 113 to 120 of the record. The opinion of the United States Circuit Court of Appeals is reported in 145 F. (2) 684. The petition for rehearing appears on page 137 of the record.

II. Statement of the Grounds on Which Jurisdiction Is Invoked

Petitioner seeks a writ of certiorari under Section 240 (a) of the Judicial Code, as amended, Title 28, U. S. C. A. 347(a), to review final judgment of the United States Circuit Court of Appeals for the Fifth Circuit. The grounds or reasons which Petitioner contends should impel this Court to review the judgment are set out in the petition on pages 7 to 8. To be concise, we refrain from repeating them.

III. Statement of the Case

The case has been stated in the petition, and for brevity's sake will not be repeated here.

IV. Questions Involved

(a) In a case arising in Florida where a party to a contract agrees to pay a stipulated sum of money as liquidated damages for non-performance of a contract and subsequent to the execution of a contract a third party enjoined one of the parties from going forward with the contract, there being no decision by the Florida Court on the question, should not the Federal Court have followed the decision of the Supreme Court of the United States, and in particular one arising from Florida holding that impossibility of performance arising subsequent to the execution of the contract would not relieve one of the parties from responding to damages for defaulting on its undertaking?

(b) In a case arising in the Federal Court in Florida where a party agrees to pay a stipulated sum of money as liquidated damages for non-performance to a contract, and subsequent to the execution of the contract a third party enjoins o 'e of the parties from going forward with the contract, there being no decision by the Supreme Court of Florida on the question, should not the Federal Court have followed the common law rule which is in force and effect in Florida holding that impossibility of performance of a contract subsequent to its execution is not such a *vis major* as will relieve either of the contracting parties from paying damages for non-performance?

(c) In a case arising in Florida in the Federal Court, there being no Florida decision on the point, should not the Federal Court have followed the decisions of other Circuit Courts of Appeal holding that an injunction sued out by a third party subsequent to the execution of a contract is not such a *vis major* as will relieve the party from its contract of paying damages for non-performance?

(d) A contract was entered into in Florida to refund the indebtedness of a County. This contract provided that the new issue of bonds would be offered for sale and the money used to replace a callable issue. An injunction is sued out by a third party restraining the County from going forward, this injunction is released three months prior to the expiration of the contract, but after the time in which the callable bonds could have been called for redemption during the life of the contract. Did the Federal Court err in determining the Florida law that the new bonds could not be sold and delivered because the old bonds had to be called and redeemed simultaneously with the sale of the new bonds, and that such old bonds could be called for redemption in the interim between the date of the lifting of the injunction and the expiration date of the contract.

ARGUMENT

(A)

The decision of the District Court is in conflict with decisions of this Court

A clear cut question of law is present. Nuveens contracted to refund the County's indebtedness. They guaranteed this performance by a $10,000 certified check, by which they contracted to pay liquidated damages if they failed to perform. After the execution of the contract a third party enjoined the County from going forward with the contract during the pendency of an appeal. Is such an injunction sued out by such a third party such a *vis major* as will excuse one of the parties from his contract of paying damages for failure to perform?

This Court, in the case of *Jacksonville Mayport, etc. Railway* v. *Hooper*, 160 U. S. 514 40 L. Ed. 515 (a Florida case), held that impossibility of performance arising subsequent to the execution of a contract was not such a *vis major* as would relieve the parties. That decision is in line with many other decisions of this Court such as *Chicago, Milwaukee & St. Paul Railway* v. *Hoyt*, 149 U. S. 1, 37 L. Ed. 625; *The Harriman*, 9 Wall. 161, 172, 173, 19 L. Ed. 629; *Jones* v. *United States*, 96 U. S. 24, 29, 24 L. Ed. 644; *Northern Pacific Railway Co.* v. *American Trading Co.*, 195 U. S. 439, 466, 467, 49 L. Ed. 269.

In the case at hand Nuveens placed no provision in the contract of indemnity guarding against the contingency which arose. They unqualifiedly promised to pay $10,000 damages for failure to perform. Clearly the District Court erred in failing to follow the United States Supreme Court decisions on the point.

(B)

The decision of the District Court is in conflict with the Common Law Rule (the Common Law Rule being in force in Florida).

The old common law rule, as announced in the case of *Parradine* v. *Jane*, Allyn 26, is that where a party contracts to do a certain thing he is firmly held to his promise, and any matter arising subsequent to the execution of that contract will not relieve him from that obligation. This common law rule is the law of Florida. Chapter 2.01 Florida Statutes, 1941. Therefore, the District Court should have followed this common law rule.

The only Florida case that might even be helpful is the case of *Moon vs. Wilson*, 100 Fla. 791, 130 So. 25, and even there the facts are not the same. In that case Moon brought an action to foreclose a statutory lien for labor and materials furnished in the construction of a house upon the defendant's property. Before the house could be completed, it was partially destroyed by the hurricane of 1926. The owner of the house defended on the ground that the subject matter had been destroyed, and therefore it should not be held bound. The question was who should bear the loss by the partial destruction of the building in process of erection. The District Court held that the loss should fall upon the contractor, and the Supreme Court of Florida affirmed. The Supreme Court pointed out the general rule:

> "It is a well settled rule of law that if one contracts absolutely and unqualifiedly to do something possible to be done, he must make his promise good unless his performance be rendered actually impossible by the act of God, the law, or the other party. If unexpected impediments lie in the way of the performance of the contract and a loss must result, it leaves the loss where

> the agreement of the parties has put it. The parties must themselves guard against unexpected contingencies by express exceptions in their contracts. If they have made no provision for a dispensation, the law gives none; it will not insert, for the benefit of one or the other of the parties, by construction, an exception which they failed, either by design or neglect, to insert in their agreement. A contract fairly made will not be annulled by an interpolation of something which the parties themselves have not stipulated."

Of course, in that case there was no specific contract to pay damages for failure to perform, but the principle is the same.

In the instant case, Nuveens promised to pay $10,000 if he failed to perform. He did not perform. Consequently it is submitted that the common law rule should apply, and he should not be relieved from his obligation by an injunction sued out by a third party.

(C)

The decision of the District Court is contrary to the decisions of other Circuit Courts of Appeal

The District Court, affirmed by the Circuit Court of Appeals, determined by the decision of *Moller vs. Herring*, (Fifth Circuit) 225 Fed. 670, that the contract became impossible of performance by operation of law. However, in the case of Moller vs. Herring, an executory contract was entered into for the sale of certain bales of cotton. Before the cotton could be delivered one of the parties, a receiver was appointed to take charge of all of the stranded cotton, and all parties were enjoined from interfering with him. In that case, the very essence of the contract was taken into the breast of the Court. That is entirely different from an injunction sued out by a third party litigant personally against one of the parties. That decision is in line with

every decision that will be cited to this court by respondent in opposition in support of their opposition. The Circuit Court of Appeals for the Sixth Circuit, in the case of *South Memphis Land Co. vs. McLean Hardware Co.*, 179 Fed. 417, (C. C. A. 6) (1910) determined that an injunction sued out by a third party would not relieve performance. It is submitted that the correct law on the subject is as stated in the case of *Klauber vs. Car Company*, 95 Cal. 353, 30 Pac. 555, where the Court pointed out that an interference of a writ sued out by a third party will not

> "* * * excuse performance of a contract, although it may deprive the contractor of a means of performance, *it is not prevented by operation of law, it is the act of an individual and not of the government.*"

Likewise, the case of *Kansas Union Life Insurance Co. vs. Burman*, 141 Fed. 848 (where the contract was held to be *ultra vires* so that every basis on which the action was brought was void), the Court in that case pointed out that where an injunction was secured by a private litigant, such an injunction will not excuse a breach of the contract. All of the text writers point to the fact that there is some confusion on the point, and therefore the question, in view of the conflict of decisions by the various Circuit Courts of Appeal, should be resolved by this Court clarifying the point.

(D)

The District Court, in Determining as a matter of Florida law that the new issue of bonds could not be sold and delivered between June, 1942 and August, 1942, because the callable bonds which they were to replace could not be called and redeemed at the time of such sale, failed to follow the decisions of Florida on the point.

Not only did the District Court fail to follow the Florida decisions on the point, but it failed to even construe the

contract as to such contention. The contract was specific and clear. It specifically provided that at the time of sale if the successful bidder desired to accelerate the delivery of the new bonds to a date prior to the next call date, the County would make delivery as requested, but the purchaser would have to pay the interest on the callable bonds from the date of the delivery of the new bonds until the next call date for the old bonds. The contract can have no other meaning. It reads as follows:

> "In the event that the successful bidder at said sale shall request the Board to accelerate delivery of said new Refunding Bonds to a date prior to the date of call, the Board will make delivery as requested, provided, however, that the successful bidder shall reimburse your Board for any interest to be paid on presently outstanding bonds between the date of delivery of the new Refunding Bonds and the date of call."

The District Court, in spite of this provision in the contract, determined as a matter of law that this could not be done. In this he was clearly in error. The case of *State vs. Miami*, — Fla. —, 19 So. (2) 410, is on all fours on that point. In that case the City of Miami had outstanding an issue of bonds which were subject to call on July 1, 1945. It adopted a resolution on August 16, 1944 to sell a new issue of bonds for the purpose of refunding its callable bonds. The District Court determined that the new bonds could be immediately sold and placed on the market some seven months before the old bonds would be called. The Supreme Court of Florida affirmed, saying:

> "The appeal is from the validating decree and the question is whether or not the City of Miami is authorized to issue and deliver immediately the proposed $7,600,000 new Refunding Bonds 1944, Series GM, to redeem bonds maturing July 1, 1945.
> "The issuing Resolution No. 18569 was adopted pursuant to Chapter 15686, Special Acts of 1931 (First

Extra-ordinary Session) and section Six, Article Nine of the Constitution regulating the issue of refunding bonds. An examination of the issuing resolution and the law as thus stated discloses that the real question for decision is whether or not approximately seven months may transpire from the time that new Refunding Bonds are issued to the maturity date of the bonds to be refunded.

"We considered a like question in City of Miami v. State, 139 Fla. 598, 190 So. 774; Fleeman v. City of Jacksonville, 140 Fla. 478, 191 So. 840; and State v. City of Miami, 142 Fla. 284, 194 So. 792. In these cases, we held that an appreciable length of time might run from the issue of the refunding bonds to the maturity of the bonds refunded. In all these case-, we were treating with periods shorter than seven months, the period involved here, but we have not limited the time to any arbitrary period."

Consequently, the County, as a matter of law, could have sold the new bonds during the interim from June to August, and the old bonds could have been called on their next interest payment date. It was of no concern to Nuveens as to whether or not the County would receive a legal bid on the bonds because its war clause would only come into operation after the bonds were offered for sale. They could not determine arbitrarily that the County would receive no bid on the bonds and then refuse to get the bonds ready for sale so no person could bid upon the same.

Conclusion

This Court should certainly exercise its supervisory power in order to clarify the many conflicting decisions of the various Circuit Courts of Appeal on impossibility of performance of a contract arising subsequent to its execution, and should clearly clarify the law and point out the distinction between impossibility arising by injunction sued out by a private litigant (which the Petitioner here con-

tends is no *vis major* whatsoever), and impossibility arising by virtue of a receivership, where the very essence of the contract is taken into the breast of the Court. Furthermore, the District Court should have followed the decisions of this Court, and in particular the decision that came up from Florida holding that impossibility of performance subsequent to the execution of the contract will not excuse one of the parties from its agreement; and furthermore, it would appear the District Court would be duty bound under the Erie Railroad case to follow the decisions as announced by the Supreme Court of Florida, which held that the new issue of bonds could be sold as a matter of law prior to the time that the old bonds were redeemable.

WHEREFORE, Petitioner respectfully submits that the writ of certiorari should be granted and this Honorable Court should review the decision of the Circuit Court of Appeals, and finally reverse it.

Respectfully submitted,

MANLEY P. CALDWELL,
Attorney for Petitioner.

(7289)

Office - Supreme Court, U.S.
FILED
APR 5 1945
CHARLES ELMORE CROPLEY

(23)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1053

OKEECHOBEE COUNTY, FLORIDA,
Petitioner,

vs.

JOHN NUVEEN AND JOHN NUVEEN, JR., AS CO-PARTNERS, DOING BUSINESS UNDER THE NAME OF JOHN NUVEEN & COMPANY.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MILLER WALTON,
Counsel for Respondents.

INDEX

Table of Cases Cited

	Page
Davies Warehouse Co. v. *Bowles*, 321 U. S. 156	2
Erie Railroad Co. v. *Tompkins*, 304 U. S. 64	1
Fidelity Union Trust Co. v. *Field*, 311 U. S. 169	1
Helvering v. *Stuart*, 317 U. S. 154	2
Malcomson v. *Wappoo Mills, C. C., S. C.*, 88 F. 680	3
Meredith v. *City of Winter Haven*, 320 U. S. 228	2
Moller v. *Herring*, 5 Cir., 255 F. 670, 3 A. L. R. 624	3
People v. *Globe Mut. L. Ins. Co.*, 91 N. Y. 174	3
Ruhlin v. *New York L. Ins. Co.*, 304 U. S. 202	1
Six Companies of California v. *Joint Highway Dist.*, 311 U. S. 180	1
Spader v. *Manufacturing Co.*, 47 N. J. Eq. 18, 20 A. 378	3
West v. *American T. & T. Co.*, 311 U. S. 223	1

Texts Cited

5 Page on Contracts, § 2702	3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1053

OKEECHOBEE COUNTY, FLORIDA,
Petitioner,

vs.

JOHN NUVEEN AND JOHN NUVEEN, JR., AS CO-PARTNERS, DOING BUSINESS UNDER THE NAME OF JOHN NUVEEN & COMPANY.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The jurisdiction of the District Court was founded solely on diversity of citizenship and amount in controversy (R. 1). Therefore, it is a question of Florida law, exclusively, whether or not the third party injunction restraining the County from performing the refunding agreement rendered performance by Nuveen a legal impossibility. *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64; *Ruhlin* v. *New York L. Ins. Co.*, 304 U. S. 202; *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169; *West* v. *American T. & T. Co.*, 311 U. S. 223; *Six Companies of California* v. *Joint Highway Dist.*, 311 U. S. 180. For that reason, if the decision conflicts with decisions

in the Sixth and Seventh Circuits, as asserted in the Petition (p. 8) and accompanying Brief (p. 14), such conflict is not, in this case, a ground on which certiorari should be granted. *Ruhlin* v. *New York L. Ins. Co., supra; Davies Warehouse Co.* v. *Bowles*, 321 U. S. 156.

The Petition admits, and rightly so, that there is no Florida decision in point (p. 7). Consequently, by deciding as they did, the District Court and the Court of Appeals each necessarily decided that the law they applied probably is the law of Florida; that the Florida Courts probably would have applied it had they been deciding the question. *Helvering* v. *Stuart*, 317 U. S. 154; *Meredith* v. *City of Winter Haven*, 320 U. S. 228. The Petition makes no showing to the contrary, and impliedly admits inability to demonstrate the probability of any other conclusion ever being reached by the Florida Courts, on like facts.

The District Judge practiced in Florida for many years, and has been presiding in and applying the law of that State for approximately ten years. Circuit Judge Waller, who concurred (R. 129) in affirming the Judgment, resides in Florida, was a prominent attorney who practiced there for years, and was formerly a District Judge in that State. Both are exceptionally well qualified, by background, training and experience, to exercise informed judgment as to the law the Florida Courts probably would apply to facts on which there is no Florida decision in point. The Petition merely seeks to have this Court consider whether or not it will arrive at some other conclusion on that question, and substitute its judgment for theirs, but shows no good reason for any such exercise of jurisdiction. *Helvering* v. *Stuart, supra; Meredith* v. *City of Winter Haven, supra.*

The cases cited in the Petition and accompanying Brief are not in point. Many did not involve the question whether or not an injunction restraining the performance of a con-

tract is an act of the law rendering its performance a legal impossibility. Those which did decide that question are readily distinguishable, on both facts and principle. They are cases in which an action or suit was brought or defended by the person enjoined, his claim or defense having been that because he was enjoined from performing he should be relieved of obligation or should not be held answerable in damages. 5 *Page on Contracts*, § 2702.

Here the impossibility of performance by Nuveen resulted from the fact that the other party to the contract was restrained from performing it (R. 117-119). The injunction restrained the County from validating or issuing the proposed refunding bonds, and from retiring the outstanding bonds by call for redemption (R. 117-119). Since the County could not perform those acts, there was no way in which Nuveen could assist in their performance (R. 117-119). The ability of Nuveen to assist was dependent on action by the County (R. 117-119). Nuveen could not assist when the County could not act (R. 117-119).

The rule of reason and common sense is that the injunction against the County rendered the dependent performance of Nuveen a legal impossibility. That must have been one reason why, lacking any Florida decision in point, both the District Court and the Court of Appeals relied on *Moller* v. *Herring*, 5 Cir., 255 F. 670, 3 A. L. R. 624, as stating the principles that the Florida Courts probably would have applied to the facts.

The cited case relies on and follows *Malcomson* v. *Wappoo Mills*, C. C., S. C., 88 F. 680, in which the Circuit Judge followed, as the more equitable doctrine, the decision of the New York Court of Appeals in *People* v. *Globe Mut. L. Ins. Co.*, 91 N. Y. 174, holding that the action of the Court rendered the contract impossible of performance, and refused to follow the New Jersey Chancery Court in *Spader* v. *Manufacturing Co.*, 47 N. J. Eq. 18, 20 A. 378, taking the

opposite view. By following *Moller* v. *Herring, supra*, the District Court and the Court of Appeals each decided that probably it is the law of Florida, and the Petition fails to give any reasonable basis for asserting that it is not. *Helvering* v. *Stuart, supra; Meredith* v. *City of Winter Haven, supra.*

The following statement in the Petition (p. 8) misconstrues the decision of the District Court:

> "The District Court, in determining as a matter of law that the callable issue of bonds (dated June 1, 1940), had to be called simultaneously with the sale and delivery of the new Refunding Bonds is contrary to many Florida decisions precisely on point."

The corresponding statement and argument in subdivision "D" of the Brief (p. 15-17) also misconstrue the decision. The District Court made no such determination, nor was any such determination made by the Court of Appeals. Instead, the District Court found:

> "And when the injunction was dissolved the plaintiffs were not deprived of insisting on their rights under the War Clause of the contract" (R. 116).
>
> "When the injunction was lifted in June, 1942, there was not an opportunity between that date and the expiration date of the contract, August 8, 1942, within which Nuveen could have performed. This is so because the bonds which were the subject matter of the proposed purchase had to be called according to their contract, and they could not have been called between June 1, 1942, and August 8, 1942" (R. 119).
>
> "A state of War existed after December 7, 1941, and exists even to this date. That fact alone is sufficient answer to defendant's fourth contention, as to all time after December 7, 1941" (R. 119).

The Court of Appeals summarized these findings by saying the District Judge thought "that when the injunction

was finally dissolved, the conditions were such as to excuse plaintiffs from performance" (R. 133). And the Court of Appeals found (R. 134-135):

> "Through no fault of plaintiffs but because of an injunction preventing the county from going on with the refunding contract, the county and plaintiffs were not able to bring the contract to completion until after the United States had become involved in War. When then the injunction was dissolved many months afterwards, plaintiffs were unwilling to comply, and defendant was not in a position to demand compliance, with the important terms of the contract that plaintiffs advertise a public sale and at that sale bid for the bonds a price of 103 and interest. The contract having thus become impossible of performance without fault on plaintiffs' part, plaintiffs became *ex aequo et bono*, entitled to a return of the deposited funds, and the judgment ordering their return was right."

There was no decision, by either the District Court or the Court of Appeals, that the outstanding callable bonds "had to be called simultaneously with the sale and delivery of the new Refunding Bonds," nor was it necessary for either Court to consider or decide that question. The resolution authorizing the issuance of the refunding bonds expressly provided that they could not be sold and the proceeds of the sale be deposited for the purpose of calling the outstanding bonds, "on a date earlier than ninety days prior to the date fixed for the redemption of the bonds to be paid with such proceeds" (R. 70). August 8, 1942, the day on which the refunding agreement expired by its terms, was a date more than ninety days prior to December 1, 1942, the earliest day, after the dissolution of the injunction, on which the outstanding bonds could be called. Consequently, the consummation prior to August 8, 1942, of a sale of the refunding bonds, would have violated the resolution authorizing their issuance, and the bonds would have been invalid.

Argument is not needed to demonstrate that the contract could not and did not require Nuveen to purchase invalid bonds.

For the reasons stated, counsel urges that the Petition is not well founded, and should be denied.

Respectfully submitted,

MILLER WALTON,
Counsel for Respondents.

WALTON, HUBBARD, LANTAFF,
ATKINS & CARSON,
1312 Congress Building,
Miami 32, Florida.

(7566)